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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

W. W. SMITH,

Plaintiff and Appellant,

v.

DONALD E. HARRIS,

Defendant and Respondent.

B211851

(Los Angeles County
Super. Ct. No. BC387265)

APPEAL from an order of the Superior Court of Los Angeles County, Gregory Wilson Alarcon, Judge. Affirmed.

Law Office of Dan Evan Fleischman and Dan Evan Fleischman for Plaintiff and Appellant.

Davert & Loe, David C. Loe, Douglass S. Davert and Jason E. Guerra for Defendant and Respondent.

The issue presented by this appeal is whether the trial court properly granted defendant's special motion to strike plaintiff's third cause of action for abuse of process under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) Because the gravamen of plaintiff's abuse of process claim arises out of defendant's conduct in making a complaint to the police department, defendant's activity is protected under the anti-SLAPP statute. As plaintiff has failed to demonstrate a probability that he will prevail on his claim, we affirm.

BACKGROUND

This case involves a long-standing internal conflict within the True Faith Missionary Baptist Church of Compton (Church). In a related prior case, Church director John Redmond and five other directors filed an action in October 2003 against Donald Harris and several other directors (collectively Harris), seeking to remove them from their directorship positions. (*John Redmond et al. v. Donald Harris et al.* (Super. Ct. L.A. County, 2007, No. BC304823).) Harris, a founding member of Church, then filed a cross-complaint for injunctive relief against the plaintiffs and against Reverend W. W. Smith, seeking to remove him as Church's pastor. (*Ibid.*)

The parties hired a mediator to supervise the process of selecting an interim board of directors. With the help of the mediator, the parties reached a settlement agreement in March 2005. In pertinent part, the agreement required Smith to retire from his pastor position with Church on April 6, 2007. Until that time, he was to serve without interruption or disruption and with the full cooperation of all parties to the agreement. In particular, Harris was prohibited from attempting to remove Smith or interfere with Smith's functions as pastor.

After Smith failed to retire from his pastor position on April 6, 2007, Harris brought a motion to enforce the agreement pursuant to Code of Civil Procedure section

664.6.¹ On September 14, 2007, the trial court denied Harris’s motion to enforce *without prejudice*, finding that both parties breached the agreement.

In October 2007, the other defendants filed a motion to enforce the agreement against Smith. The trial court granted the motion on December 14, 2007, ordering Smith to retire immediately as Church pastor. Smith appealed and we affirmed. (*Redmond v. Harris* (Apr. 28, 2009, B204845) [nonpub. opn.].)

In March 2008, while his original appeal was pending, Smith filed a new action against Harris and other Church members (again, collectively Harris) that is the subject of this appeal. The complaint contained six causes of action: breach of settlement agreement, rescission of the agreement, abuse of process, invasion of privacy, defamation, and intentional infliction of emotional distress. Only the abuse of process claim is involved in this appeal.

In the abuse of process claim, Smith alleged that Harris “intentionally misused or misapplied the December 14, 2007 ruling to involve, deceive and defraud the police for an end other than which it was designed to accomplish and for the improper purpose and ulterior motive for having [Smith] arrested, threatened with arrest or removed from [Church] property, a procedure which the December 14, 2007 ruling was not designed or intended to achieve”

On May 22, 2008, Harris filed a special motion to strike each of the six causes of action in Smith’s complaint pursuant to the anti-SLAPP statute. He asserted that “[t]he heart of [Smith’s] [c]omplaint is that [Harris] engaged in several speech-related activities which 1) breached the settlement agreement from the previous litigation, and 2) gave rise to other torts allegedly committed by [Harris].”

¹ Code of Civil Procedure section 664.6 provides: “If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.”

In support of the special motion to strike, Harris stated in his declaration: “I was threatened by [Smith] and other members of the church. I called the police and asked them to come to the church for my own safety. I did not ask police to attempt to remove [Smith] as pastor or otherwise enforce the terms of [the] order, nor did I ask the police to remove [Smith] from the church grounds.”

On June 13, 2008, Smith filed an opposition to Harris’s motion and separate evidentiary objections. He argued that the anti-SLAPP statute does not apply to Harris’s conduct because it was not an exercise of a right to petition or free speech and that Harris “never specifically explain[ed] how [his] actions are protected as they relate to Reverend Smith’s allegations.”

Smith also argued that assuming Harris’s conduct did indeed *arise from* the exercise of protected activity, “the admissible evidence contained in the prior September 14, 2007 ruling, cited Reporter’s Transcripts, and admissions of both Donald E. Harris and Cleveland Owens powerfully establish a strong ‘probability’ that Reverend Smith will prevail on the claims asserted against [Harris]” Smith filed several evidentiary objections to Harris’s declaration in support of his motion to strike.

On August 29, 2008, the trial court granted Harris’s motion to strike *with respect to the abuse of process claim*, but denied the motion regarding the remaining five causes of action. The trial court determined that Harris’s telephone call to the police department was an exercise of his right to petition, and thus Harris met the initial burden for anti-SLAPP protection as to the abuse of process claim. The trial court noted that Smith failed to address the issue of the probability of his prevailing on the claim, contending only that the burden had not shifted.

DISCUSSION

Smith contends that the trial court’s decision to dismiss the abuse of process cause of action was in error, claiming that Harris failed to meet his initial burden to show that the abuse of process claim *arose from* a protected right of petition or free speech. We disagree.

A. De Novo Review

We review the trial court's ruling de novo by “conducting an independent review of the entire record.” (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1124.) We independently determine whether a cause of action against the moving party arises from the moving party's exercise of the right of petition or free speech, and if so, whether the opposing party has established a probability of prevailing on the claim. (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456 (*Gray Davis*).) “However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.]” (*Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1510 (*Chabak*).)

B. Anti-SLAPP Statute

Code of Civil Procedure section 425.16 (the anti-SLAPP statute) was enacted “to dismiss at an early stage nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue.” (*Gray Davis, supra*, 102 Cal.App.4th at p. 455, fn. 2.) It provides in pertinent part that “[a] cause of action against a person *arising from* any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (Code Civ. Proc., § 425.16, subd. (b)(1), italics added.)

Ruling on an anti-SLAPP motion is a two-step process. To prevail, the moving party must first make a threshold showing that the challenged cause of action *arises from* an act in furtherance of its petitioning or free speech rights in connection with a public issue. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*Cotati*).) If the court finds that the defendant has made such a showing, it then considers whether the plaintiff has demonstrated a *probability of prevailing on the claim*. (*Ibid.*)

1. The “Arising From” Requirement

For a cause of action to *arise from* “means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech” in connection with a public issue. (*Cotati, supra*, 29 Cal.4th at p. 78.) The critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity. (*Ibid.*) The defendant will meet its burden by “‘demonstrating that the act underlying the plaintiff’s [claim] fits one of the categories spelled out in section 425.16, subdivision (e)’” (*Cotati*, at p. 78.)

Subdivision (e) of Code of Civil Procedure section 425.16 states that “[an] ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”

We first address Smith’s claim of evidentiary error. He contends that Harris’s “SLAPP motion was not supported by any admissible evidence” and that “the [trial court] never ruled on Reverend Smith’s evidentiary objections to the declaration of Donald E. Harris.” At the hearing, Smith objected and moved to strike the declaration, arguing that it was “irrelevant, irrelevant to the issues underlying [Harris’s] Special Motion, without proper foundation, assumes irrelevant facts not properly in evidence, contains hearsay or references to documents containing hearsay and improper opinion.” The court failed to rule, but Smith preserved the objections by requesting a ruling. (*Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710–713.) On appeal, Smith argues that the

declaration “should have been stricken pursuant to Reverend Smith’s June 13, 2008 evidentiary objections”

Smith forfeits his claims of trial court error because he does not support his evidentiary objections with citation to legal authority. (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649 [“If an appeal is pursued, the party asserting trial court error may not then rest on the bare assertion of error but must present argument and legal authority on each point raised.”].) And Smith’s objections are not well taken as to the critical part of Harris’s declaration that “I was threatened by [Smith] and other members of the church. I called the police and asked them to come to the church for my own safety. I did not ask police to attempt to remove [Smith] as pastor or otherwise enforce the terms of [the] order, nor did I ask the police to remove [Smith] from the church grounds.” These facts are within Harris’s personal knowledge, relevant, and admissible.

Smith maintains that his abuse of process complaint “is not directed at Harris solely because he allegedly ‘called the police.’” He asserts that “[c]alling the . . . police to have Reverend Smith arrested or removed from his own church using the December 14, 2007 orders as alleged was never an issue in the underlying action or of public interest and did not arise from any exercise of Harris’s free speech or petition rights.” Rather, Smith argues that the claim is based on Harris’s “malicious, deliberate and wrongful acts in using the December 14, 2007 [ruling] as a pretext to call and defraud the . . . police into arresting or removing Reverend Smith from his church.”

This distinction is specious because Smith cannot separate Harris’s summoning the police from his abuse of process complaint. Although Smith asserts that the claim is not directed at Harris’s act of calling the police, both his original complaint and his opening brief explicitly allege that Harris “us[ed] the December 14, 2007 [court] order to call the . . . police to have Reverend Smith arrested, detained or removed from church property” It follows that the gravamen of Smith’s abuse of process complaint is Harris’s act of calling the police department. Stated another way, Smith would have no basis for his complaint if Harris had not contacted the police department.

Based on well established precedent, we determine that Harris’s act of calling the police department was in furtherance of his right to petition the government and thus protected activity under the anti-SLAPP statute. (*Chabak, supra*, 154 Cal.App.4th at p. 1511; *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570 (*Siam*).)

Chabak held that making a police report was protected petitioning activity under the anti-SLAPP statute. (*Chabak, supra*, 154 Cal.App.4th at p. 1511.) There, a patient reported to the police that she was inappropriately touched by a physical therapist during a session. The therapist filed an action against the patient for making an alleged false report of child abuse to the police.² The patient responded by filing a special motion to strike under the anti-SLAPP statute, which was denied by the trial court. The appellate court reversed, holding that “[the defendant’s] statement to the police arose from her right to petition the government and thus is protected activity” under Code of Civil Procedure section 425.16. (*Chabak*, at p. 1512.)

Similarly, *Siam* held that reporting child abuse to persons bound by law to investigate the report or to transmit the report to the authorities was a protected communication under the anti-SLAPP statute. (*Siam v. Kizilbash, supra*, 130 Cal.App.4th at p. 1570.) There, the defendant contacted law enforcement authorities and school officials, accusing the plaintiff of physically abusing his two sons. The plaintiff denied the allegations and sued the defendant, who responded by filing a special motion to strike under the anti-SLAPP statute. The trial court denied the motion, but the appellate court reversed, holding that “[c]ommunications that are preparatory to or in anticipation of commencing official proceedings come within the protection of the anti-SLAPP statute.” (*Siam*, at p. 1570; see also *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1286–1287 [real property vendor’s contacts with municipal departments seeking

² Penal Code 11172 states in its pertinent part: “(a) . . . Any other person reporting a known or suspected instance of child abuse or neglect shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false or was made with reckless disregard of the truth or falsity of the report”

official investigation that could culminate in criminal proceedings or other official proceedings were protected activities under the anti-SLAPP statute].)

Finally, Smith contends that Harris did not establish that his conduct “involved a matter of ‘public’ concern.” But “[u]nder section 425.16, a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance.” (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) Communications preparatory or in anticipation of bringing an action or other official proceeding are protected by Code of Civil Procedure section 425.16. (*Siam, supra*, 130 Cal.App.4th at p. 1570.) Thus, Harris does not have the additional burden of proving that his statement was a matter of “public interest.”

2. Probability of Prevailing on the Merits Requirement

Once the moving party has satisfied the first prong of the anti-SLAPP statute, the burden then shifts to the plaintiff to establish that there is a probability that the plaintiff will prevail on the claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) To prevail, the plaintiff need only ““demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”” (*Id.* at p. 88–89.) If the plaintiff cannot meet this burden, the trial court strikes the claim. (See *Gray Davis, supra*, 102 Cal.App.4th at pp. 460–461.)

The trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant. (Code Civ. Proc., § 425.16, subd. (b)(2).) “[T]hough the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.” (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 476–477.) Thus, the plaintiff’s burden of proof in

opposing an anti-SLAPP motion is akin to that of a party opposing a motion for summary judgment or judgment on the pleadings. (*Id.* at p. 476.)

Smith asserts that the burden to establish a probability of prevailing on the claim had not yet shifted to him because Harris failed to sufficiently prove that his conduct was protected speech or petitioning activity. Because we have determined that Harris's conduct is protected petitioning activity, the burden shifted to Smith to demonstrate a probability of his prevailing on the claim. But Smith's briefs rely on the assumption that the burden had not yet shifted and make no argument demonstrating a probability of prevailing on the merits. As a result, Smith has not satisfied his burden on appeal and we accordingly must affirm.

We observe that any such argument as to the viability of the abuse of process claim would fail because Civil Code section 47, subdivision (b) establishes an absolute privilege for a citizen's report of suspected criminal activity to the police.³ (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 355.)

In sum, the abuse of process action falls within the anti-SLAPP statute, and Smith has failed to demonstrate a probability of prevailing on his claim. Accordingly, the anti-SLAPP motion was properly granted and we affirm.

³ Civil Code section 47 provides: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure"

DISPOSITION

The order is affirmed. Donald E. Harris is entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

FERNS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.